IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 529

UNITED STATES, *Petitioner*,

v.

CARLO BIANCHI & CO., INC., *Respondent*.

On Writ of Certiorari to the United States Court of Claims

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

AND

BRIEF OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

BAR ASSOCIATION OF THE
DISTRICT OF COLUMBIA

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Bar Association of the District of Columbia hereby respectfully moves for leave to file a brief, appended hereto, as *amicus curiae*, in support of the position of respondent.

Respondent has consented to the filing of this brief *amicus curiae*. Petitioner has not consented.

The Bar Association of the District of Columbia is an organization formed for the purpose of promot-

ing the due administration of justice. Its members include a substantial number of attorneys who practice before the United States Court of Claims.

The issue before this Court concerns review of administrative public-contract decisions by the Court of Claims pursuant to the Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act, 41 U.S.C. 321-322). This issue concerns, in addition to the rights of the immediate parties involved, the future rights of all parties who enter into contracts with the United States. Should this Court adopt the position of petitioner, private parties would be effectively precluded from seeking judicial relief in the Court of Claims pursuant to the Wunderlich Act, 41 U.S.C. 321. The Bar Association of the District of Columbia, therefore, asks leave to file herein the annexed brief, *amicus curiae*.

Respectfully submitted,

BAR ASSOCIATION OF THE
DISTRICT OF COLUMBIA

GLEN A. WILKINSON
Chairman, Court of
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Of Counsel:

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BASIS OF INTEREST OF AMICUS CURIAE

The Bar Association of the District of Columbia is an organization formed for the purpose of promoting due administration of justice. Its members include a substantial number of attorneys who practice before the United States Court of Claims and handle the class of matters involved in this litigation. It is interested in insuring that substantial justice is accomplished between the United States and its citizens, and that the intent of Congress in the Wunderlich Act is vindicated.

QUESTION PRESENTED

Does that portion of the Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act, 41 U.S.C. 321-322), which provides that an agency's public-contract decision "shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence" restrict the court to a consideration of the record developed before the administrative agency?

ARGUMENT

A. Federal courts are not restricted to consideration of the record developed before the agency when the United States is sued for breach of contract.

Your *amicus* adopts, without repetition, respondent's argument entitled: "The Wunderlich Act was intended to restore the standards employed by the Court of Claims before the decision of this Court in United States v. Wunderlich in determining the finality of administrative decisions and was not intended to change its procedures for applying such standards." Respondent's Brief, pp. 6-38.

In short, it is the position of your *amicus* that Congress, in enacting the Wunderlich Act was restoring to parties who entered into contracts with the government the rights they possesed prior to the *United States v. Wunderlich*, 342 U.S. 98 (1954), including the right to a trial *de novo*.

Judicial decisions resulting from controversies between contractors and government agencies subsequent to the Wunderlich Act are not uniform. District courts have determined whether rulings were based on "substantial evidence" by examining the administrative record. See *Mann Chem. Labs, Inc.* v. *United States*,

174 F. Supp. 563 (D. Mass. 1958); *Wells & Wells, Inc.* v. *United States*, 164 F. Supp. 26 (E.D. Mo. 1958). The Court of Claims has allowed trials *de novo*. The administrative record is regarded merely as former testimony. See *Felhaber Corp.* v. *United States*, 138 C. Cls. 571, 151 F. Supp. 817 (1957); *Volentine & Littleton* v. *United States*, 136 C. Cls. 638, 145 F. Supp. 952 (1956). Some decisions fall somewhere between these two approaches. See *Lowell O. West Lumber Sales* v. *United States*, 270 F. 2d 12 (9th Cir. 1959); *P.L.S. Coat & Suit Corp.* v. *United States*, 148 C. Cls. 296, 180 F. Supp. 400 (1960). Under this view, the courts review both the administrative record and any additional evidence the parties introduce voluntarily or by subpoena.

The Wunderlich Act was remedial legislation designed to correct a situation in which the government, with dominating powers because of its huge procurement and public works programs, had been able to frustrate court review by provisions in the contract against such review. *United States* v. *Wunderlich*, 342 U.S. 98 (1951). It was held that a contractor was effectively foreclosed, absent fraud, from obtaining relief upon a claimed breach of contract—relief including the development of the full facts of the case through trial in the normal course of court business—relief available to all citizens in their contracts save as the contracts were with the federal government. After the *Wunderlich* case and until the Wunderlich Act, if fraud were not alleged, no evidence concerning other defects in the agency decision could be introduced. This Court noted that only congressional action could modify this rigid standard. In 1954, Congress acted to remedy the situation in the Wunderlich Act. The remedial purpose of Congress must be given full credit in inter-

preting that Act; the Act must be liberally construed to accomplish the congressional intent to make the remedy effective. *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957); *Stewart* v. *Kahn*, 11 Wall. 493, 504 (1870) *Securities & Exchg. Comm.* v. *Joiner*, 320 U.S. 344, 353, 355 (1943).

B. Congress could not have intended that the Court of Claims be restricted to consideration of the agency record.

Petitioner concedes that "A full administrative record is essential to determine whether an administrative agency has violated the standards of the Wunderlich Act." Petitioner's brief, p. 37.

But how is such a determination to be made when an agency lacks subpoena, oath and discovery powers and the reviewing court is thus limited, as petitioner contends, to a review of a record formulated without the basic powers necessary to assure an adequate record? Much or all of the testimony produced by compulsion may be determinative of the issues. As it stands now, and as it stood when Congress passed the Wunderlich Act, only a court may assure production of all necessary evidence. Contract review boards and the agencies they represent seldom place witnesses under oath, and generally have no power to compel their attendance, or insure production of documents. Maintenance of a verbatim transcript is optional with most agencies. 43 C.F.R. §§ 4.1-.6 (1954); see Cuneo, Determination of Government Contract Disputes, 4 Prac. Law. 54 (1958). One example is the General Services Administration rule which for many years provided that the hearing was to be in the nature of a "round-table discussion" where "the parties involved may offer at a hearing such evidence or arguments as they

deem appropriate, subject to discretion of the presiding officer." 2 C.C.H. Gov't Cont. Rep. § 7447.

These procedural deficiencies, which prevented development of full records before administrative agencies, existed to an even greater extent when Congress enacted the Wunderlich Act.[1] The Wunderlich Act represented an attempt to assure an adequate judicial remedy. Such remedy cannot be achieved should courts be restricted to a review of the record. Whether there is substantial evidence to support the agency decision or whether the determination is "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith", can only be determined by the court on trial *de novo* made with the tools of subpoena, oath and discovery; it can never be determined by inspection of an inadequate record containing something less than all competent, relevant and material evidence.[2]

In addition, should petitioner's contention be adopted by this Court procedural inconsistencies will ensue.[3] These potential deficiencies existed when Con-

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[1] Note that the still deficient procedures of the General Services Administration were adopted subsequent to the Wunderlich Act.

[2] The House Committee report contains this observation (H. Rept. No. 1380, 83d Cong., 2d Sess.):

> "It has been brought to light in public hearings that it is the exception rather than the rule that contractors in the presentation of their disputes are afforded an opportunity to become acquainted with the evidence in support of the government's position."

[3] For example, should a contractor sue the Government for damages for breach of contract the action must be initiated in the Court of Claims. The same is true where the government counterclaims or requests set offs. Thus, those issues concerning counterclaim, set off or damages would be decided by trial *de novo* while the court, in determining the interrelated issue pursuant to the Wunderlich Act, would be restricted to a review of the record.

gress was considering passage of the Wunderlich Act. As stated the congressional purpose in enacting this legislation was to overcome the effect of this Court's holding in the *Wunderlich* decision. See H. Rept. No. 1380, 83d. Cong., 2d Sess. Accordingly, the statute should be read in light of this general purpose "and applied with a view to effect this purpose", *Federal Trade Comm.* v. *Western Meat Co.*, 272 U.S. 554, 559 (1926). Application of the pre-*Wunderlich* standards of judicial review, which include a trial *de novo*, are consistent with the legislative purpose, will avoid the heretofore mentioned procedural inconsistencies and provide the Court of Claims with the opportunity of rendering a determination based on a review of all relevant, competent and substantial evidence.

C. The plain language of the Wunderlich Act demonstrates that the Court of Claims is not confined to the record compiled by the agency.

Petitioner contends that the Wunderlich Act confines judicial review to the evidence before the administrative agency except where fraud has been alleged. Petitioner's brief, pp. 20-24. Such a contention flies in the face of the plain language of the Act: the Act allows judicial review where a determination is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

There is no different standard of review when only fraud is alleged. The same standard applies to the question whether a decision is based on substantial evidence.

Nor is the standard of judicial review identical with that of the Administrative Procedure Act, 5 U.S.C.

1001.[4] The Administrative Procedure Act establishes standards for judicial review. But agencies resolving public-contract disputes are not subjected to its procedural standards. Had it intended so to restrict judicial review, Congress would have subjected public-contract disputes to the procedural provisions of the Administrative Procedure Act.

CONCLUSION

The judgment of the Court of Claims insofar as it relates to interpretation of the Wunderlich Act, should be affirmed.

Respectfully submitted,

BAR ASSOCIATION OF THE
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[4] Petitioner so contends. Pet. Br., p. 32. But, as stated in the House Committee Report, No. 1380, one purpose of the Wunderlich Act was to "*restore* the standards of review based on arbitrariness and capriciousness." (Emphasis added) Had Congress intended to limit review of public-contract disputes to the administrative record, it would have subjected such litigation to the standards of the Administrative Procedure Act. This would have assured compilation of an adequate record. Its deliberate failure to do so demonstrates an intention to provide a wider basis for the evidence to be used for review.